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No. 77-895

In the Supreme Court of the United States

OCTOBER TERM, 1977

BERNARD RYAN and JOHN McDONALD,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

Petitioners, Bernard Ryan and John McDonald, pray that a Writ of Certiorari be issued to review the judgment of the Appellate Court of Illinois, First District, Third Division.

Order Below

The Order of the Illinois Appellate Court (disposing of the appeal without reported opinion under Illinois Supreme Court Rule 23) is set forth as Appendix A to this Petition.

Jurisdiction

The judgment of the Appellate Court of Illinois was entered on March 23, 1977. Petition for Leave to Appeal was denied by the Illinois Supreme Court on September 30. 1977. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. May unverified "hue and cry" of unidentified persons (apparent bystanders), without more, constitute probable cause to arrest a citizen, consistent with Fourth Amendment and due process standards?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Chap. 38. sec. 16(1)(a)(1) Ill. Rev. Stat. 1971, provides:

"A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; . . . and

(1) Intends to deprive the owner permanently of the use or benefit of the property; . . ."

Statement of the Case

Petitioners were indicted for theft of property valued in excess of $150 and, after a bench trial, were convicted of theft of property not exceeding $150 in value. (Ill. Rev. Stat. 1971, chap. 38, sec. 16-1(a).) Each was sentenced to serve 1 year in the House of Correction.

Statement of Facts

The facts are set forth in the Appellate Court's order (App. A), and are not repeated here to avoid unnecessary duplication. Specific facts are fully set forth within the Petition as necessary to the arguments raised.

Raising the Federal Questions Below

The federal constitutional issues here presented were raised at trial, in the Appellate Court, and in the Illinois Supreme Court.

In the lower court (before trial), petitioners timely filed a written motion to suppress evidence asserting the police lacked probable cause for a warrantless arrest. The motion was denied after evidentiary hearing.

The issue was presented again in appropriate post-trial motions; and presented in the direct appeal to the Appellate Court, which affirmed (App. A), and on Petition for Leave to Appeal to the Illinois Supreme Court, which declined to take the case (App. B).

REASONS FOR GRANTING THE WRIT

1.

Petitioners were improperly convicted on the basis of evidence illegally seized as a result of their warrantless, unconstitutional arrest without probable cause; "Hue and cry" cannot suffice.

Petitioners were arrested when two police cars caused the car in which they were driving to stop in an alley. At the time they gave pursuit, the officers knew *only* that a man carrying a case was running out of a car leasing establishment followed by a small group of individuals yelling such things as, "Stop, thief." (Tr. 49-50, 56, 181)[1]

The officers' suspicion that petitioners may have committed some offense is no substitute for that probable cause required by the Fourth Amendment and by due process of law.

Even if the reliability test of *Aguilar* v. *Texas,* 378 U.S. 108 (1964), is not wholly applicable to reports from citizens who are not designated "informers," (see App. A, p. 3), reports of such citizens still must be subject to the "underlying facts" test of *Spinelli* v. *United States,* 393 U.S. 410 (1969). Here, the officers knew no "underlying facts" whatsoever. The Appellate Court has ignored this federal constitutional requirement.

When the police seize a person (*i.e.,* arrest him) without a warrant, there must be more; more than mere suspicion.

[1] "Tr." refers to the Transcript of Proceedings, and "C." to the Common Law Record.

At the moment of arrest, the officer must possess *at least* as much evidence amounting to probable cause as would justify the issuance of a warrant by a judicial officer. *Whitely* v. *Warden,* 401 U.S. 560, 566 (1971).

Here, the officers had no more than mere rumor and report. No checking was done with any of the pursuers who carried the "hue and cry." The officers did not observe any illegal conduct. The mere throwing of the case out of the car—assuming this was in fact witnessed, as was testified to—does not increase the otherwise inadequate information in the possession of the officers sufficiently to render it equivalent to probable cause within the purview of the Fourth Amendment. *People* v. *Roebuck,* 25 Ill.2d 108, 183 N.E.2d 166 (1962).

And the Appellate Court's "easy answer" that the case could in no event be suppressed, as it had been "abandoned" and thus could not be subject to an illegal search, see App. 3, is no answer at all, in light of the foregoing.

The constitutional error cannot be deemed "harmless," regardless of this Court's possible assessment that the other evidence may be sufficient to support conviction. See *Wrightson* v. *United States,* 222 F.2d 556, 561-62 (D.C. Cir. 1955). It is impossible for this Court to conclude beyond a reasonable doubt that the constitutional error herein was harmless, as is required by *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

Upholding the arrest and seizure of petitioners and the sample case herein amounts to judicial justification of unconstitutional conduct on the basis of the fruits of the search. The mandate of the Fourth Amendment cannot thus be thwarted and ignored. Only by suppression of evidence so obtained can official compliance be fostered. *Mapp* v. *Ohio,* 367 U.S. 643, 651-52, 657-60 (1961). The purpose

of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Certiorari should therefore be allowed.

Because petitioners were illegally arrested in violation of their constitutional rights, the motion to suppress was erroneously denied, and their convictions should be reversed.

Conclusion

The Writ should be granted to resolve the "hue and cry" issue as it pertains to the Fourth Amendment.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
Attorneys for Petitioners

APPENDIX

APPENDIX A

ORDER OF THE APPELLATE COURT

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

The defendants, John McDonald and Bernard Ryan, were indicted for theft of property valued in excess of $150 and, after a bench trial, they were found guilty of theft of property not exceeding $150 in value. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a).) They were sentenced to serve one year in the House of Correction.

The issues for review are whether the defendants' convictions were based on illegally seized evidence; whether there was sufficient proof of the value of the stolen property; and whether there was proof beyond a reasonable doubt that defendant McDonald was accountable for Ryan's theft.

Prior to trial, a written motion to suppress evidence because the police lacked probable cause for a warrantless arrest was filed, and a hearing was held on October 8, 1974. Officers Cortese and Sullivan of the Chicago Police Department testified they were waiting at a traffic light at Ardmore Street and North Broadway Avenue in an unmarked car when they observed the defendant Ryan carrying a brown leather case, and being chased north on Broadway by several people who were yelling "Stop, thief." Ryan got into a green car driven by the defendant McDonald. Cortese and Sullivan gave chase in their car using the siren and flashing lights, as did police in a second unmarked car which, coincidentally, had been waiting at the same traffic light. McDonald turned east into Ardmore Street and then turned into one alley, backed out of it, continued east on Ardmore, and then turned into a second

alley. The officers observed Ryan throw the case out the window of the car as it turned into the second alley. They stopped the defendants' car shortly after Officer Cortese fired his gun once into the ground.

McDonald testified that Ryan was not carrying anything when he got into the car, and he did not see him throw anything out the window as they drove down the alley. He got scared when he heard gunshots, but he did not hear any sirens.

The trial court denied the motion to suppress.

At trial the complainant, Leo Willis, testified he put down his jewelry sample case when he entered a garage on North Broadway and had walked several feet away when he saw Ryan pick it up and run with it. He and several others chased Ryan and saw him get into a green car. He continued chasing the car on foot and arrived on the scene when Officer Cortese retrieved his sample case at the mouth of the alley. Willis testified the market value of the jewelry in the case was $800 on the day in question. But on cross-examination he was not able to state with certainty what merchandise had been in the case.

The court found there had been inadequate proof as to the valuation of the sample case, and found the defendants guilty of theft of property valued at less than $150.

The defendants first contend they were improperly convicted on the basis of evidence illegally seized because they were arrested without a warrant and without probable cause. They argue the officers had no probable cause to arrest, based upon the observations of a group of individuals chasing Ryan and yelling, "Stop, thief." The existence of reasonable cause which will justify an arrest without a warrant depends upon factual and practical con-

siderations of everyday life on which reasonable and prudent men, not legal technicians, act. (*Brinegar* v. *United States* (1949), 338 U.S. 60, 69 S.Ct. 1302; *People* v. *Jones* (1967), 38 Ill. 2d 427, 321 N.E.2d 580.) The law in Illinois is clear that police officers are justified in relying on information provided by ordinary citizens (*People* v. *Finklea* (1976), 40 Ill. App. 3d 975, 354 N.E.2d 57), and it is not necessary for the officers to have interviewed the persons giving chase before responding. The reliability requirement applicable to professional informers does not apply to ordinary citizens. (*People* v. *Hester* (1968), 39 Ill. 2d 489, 237 N.E.2d 466; *People* v. *Hoffman* (1970), 45 Ill. 2d 221, 258 N.E.2d 326.) The facts of this case justified the police action in stopping and arresting defendants. Moreover, the only physical evidence seized by police was Willis' sample case. Since this item was abandoned, it could not be subject to an illegal search. *People* v. *Sylvester* (1969), 43 Ill. 2d 325, 253 N.E.2d 429.

Defendants next contend there was insufficient proof of the value of the sample case. Although the complainant, Leo Willis, testified the value of the contents of the case on the date in question was $800, the court found that there was insufficient proof of value, apparently based on Willis' inability to state with certainty what specific merchandise was in the case at the time of the theft. However, the trial court noted that a sample case of jewelry has some value, and it is well settled that a court may take judicial notice that property has value. (*People* v. *Tassone* (1968), 41 Ill. 2d 7, 241 N.E.2d 419.) Theft is committed by stealing anything of value regardless of the amount thereof. (*People* v. *Kelley* (1965), 66 Ill. App. 2d 204, 214 N.E.2d 290.) In this case the defendants were found guilty of theft of property, valued at less than $150, and the defendants cannot claim they were prejudiced in anyway.

McDonald contends that the only evidence against him is that he drove the car after Ryan had accomplished the theft, and there are no facts or circumstances from which it could be inferred that he was involved in the planning or commission of the offense. He argues there is no evidence that he intended to promote or facilitate the commission of the offense as required by section 5-2 of the Illinois Criminal Code which pertains to the accountability of the accused for another's criminal conduct. (Ill.Rev.Stat. 1971, ch. 38, par. 5-2.) Proof of acts in furtherance of a common design or purpose to commit a crime need not be supported by words of agreement but may be drawn from the circumstances surrounding the commission of the crime. (*People* v. *Williams* (1968), 104 Ill. App. 2d 329, 244 N.E.2d 347.) In the case of *People* v. *Richardson* (1971), 132 Ill. App. 2d 712, 270 N.E.2d 568, the court held that a defendant who knowingly drove a "getaway car" is as legally responsible as the principal. In this case the evidence shows that McDonald opened the car door for Ryan as Ryan was being chased by a group of people, yelling "Stop, thief." McDonald then drove the car into one alley and then another, despite the fact that two police cars were in pursuit and were using their sirens and flashing lights. We conclude there was ample evidence to show that McDonald knowingly drove a getaway car, and he was proved guilty beyond a reasonable doubt.

An opinion in this case would have no precedential value. Pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1975, ch. 110A, par. 23), the judgments of the circuit court of Cook County are affirmed.

Dated at Chicago, Illinois, this 23rd day of March, 1977.

APPENDIX B

State of Illinois
office of
CLERK OF THE SUPREME COURT
Springfield

62706

September 30, 1977

No. 49505—People State of Illinois, respondent, vs. Bernard Ryan, et al., petitioners. Leave to appeal, Appellate Court, First District.

Denied